

FCC MAIL SECTION
FEDERAL COMMUNICATIONS COMMISSION

FCC 99-297

Oct 26 11 21 AM '99 Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

DISPATCHED BY

In re)
)
JERRY SZOKA) CIB Docket No. 98-48
Cleveland, Ohio)
)
Order to Show Cause Why)
A Cease and Desist Order)
Should Not Be Issued)

ORDER

Adopted: October 14, 1999 ; Released: October 19, 1999

By the Commission:

1. This Order denies a Petition for Reconsideration filed July 15, 1999 by Jerry Szoka. Szoka seeks reconsideration of a Decision, Jerry Szoka, FCC 99-145, released June 15, 1999, in which the Commission ordered Szoka to cease and desist from operating an unauthorized broadcast station in violation of Section 301 of the Communications Act of 1934, as amended, 47 U.S.C. § 301, which prohibits unlicensed radio communications, and imposed a monetary forfeiture of \$11,000 for operating in violation of Section 301. We also reject Szoka's request, which he incorporates in his Petition, that we stay this proceeding.

2. In our Decision, we found that Szoka has been operating a radio station in the FM frequency band in Cleveland, Ohio without a license since November 1996. Even though Szoka was informed by FCC officials in 1997 that his operation was illegal, he has continued to operate the station. Szoka defended his unlicensed operation by contending that the Commission's "regulatory ban on microbroadcasters" like himself -- those who operate with less than 100 watts -- violated his free speech rights, but our Decision explained in detail that Szoka's assertions were similar in essential respects to those considered and rejected by the Commission and the courts in other cases involving unlicensed operations. In imposing a forfeiture for Szoka's unlicensed operation, we also rejected Szoka's argument that the forfeiture violated his constitutional rights and the Small Business Regulatory Enforcement Fairness Act. Among other things, we pointed out that Szoka engaged in willful conduct in operating an unlicensed station in violation of Section 301 and failed to make any good faith effort to comply with the licensing requirement.

3. In his Petition, Szoka initially cites to the Commission's Notice of Proposed Rulemaking, Creation of a Low Power Radio Service, 14 FCC Rcd 2471 (1999), which proposes the possible authorization of new, low power FM radio stations, and requests that the

cease and desist order in this proceeding be stayed pending completion of the rulemaking. In an attached Supplemental Declaration, Szoka asserts that his programming serves a public need and should not be removed from the air during the pendency of the rulemaking. Alternatively, Szoka requests a stay so that he can submit and receive approval of an application for license and request for rule waiver. In support of reconsideration of our Decision, Szoka argues that he has standing to challenge the Commission's licensing scheme, which he contends is overly broad, and that the Commission did not address his constitutional objection that the licensing scheme violates Szoka's First Amendment rights. Szoka further maintains that the \$11,000 forfeiture is unconstitutionally excessive in violation of the Eighth Amendment because it bears no relationship to the gravity of the offense charged. In this regard, Szoka argues that the Commission erred in concluding that his conduct was willful because it was FCC policy, not his unwillingness, that prevented him from obtaining a license. Finally, Szoka contends that the monetary fine for his unlicensed operation should be reduced to \$1 because he is unable to pay the proposed forfeiture, and he submits recent tax returns and a personal financial statement in support of his claim. The Compliance and Information Bureau opposes Szoka's petition, including his requests for a stay and for reduction of the forfeiture.

4. We deny Szoka's Petition in all respects. First, with regard to Szoka's request that we stay our underlying Decision and the cease and desist order until completion of the FM low power rulemaking proceeding or such time as Szoka applies for and receives licensing approval, we point out that the Commission's rules governing requests for stay mandatorily require that such requests be filed separately. The pertinent rule provision states:

Any request to stay the effectiveness of any decision or order of the Commission shall be filed as a separate pleading. Any such request which is not filed as a separate pleading will not be considered by the Commission.

47 C.F.R. § 1.44(e). Because Szoka incorporated his stay request in his Petition for Reconsideration, his request for stay may not be considered.¹ In any event, apart from being procedurally defective, Szoka's stay request is also deficient because in seeking to continue his violation of law it does not address any of the elements of the multi-part showing traditionally applied to stay motions, *i.e.*, likelihood of success on the merits, irreparable injury, no harm to other interested parties, and the public interest. See Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841, 842-43 (D.C. Cir. 1977); Virginia Petroleum Jobbers Ass'n. v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958).

¹The Bureau noted this defect in its opposition pleading. Bureau Opposition at 2. Nevertheless, although the rules governing petitions for reconsideration permit the filing of replies to oppositions, see 47 C.F.R. § 1.106(h), and there is no temporal limitation on the filing of petitions for stay, Szoka did not file a reply pleading or file any separate request for stay.

5. A petition for reconsideration must be based on new facts, changed circumstances, or material errors or omissions in the underlying opinion. See 47 C.F.R. § 1.106(c) and (d). The Commission does not grant reconsideration simply for the purpose of reviewing matters which it has already considered and resolved. See WWIZ, Inc., 37 FCC 685 (1964), aff'd sub nom. Lorain Journal Co. v. FCC, 351 F. 2d 824 (D.C. Cir. 1965), cert. denied, 383 U.S. 967 (1966). We agree with the Bureau that Szoka does not present a sufficient basis for reconsideration because his Petition largely reiterates the same arguments that the Commission previously considered and rejected.

6. We explained in our Decision that the Commission's rules governing low power operations do not violate Szoka's First Amendment rights and are not inconsistent with our statutory mandate. Specifically, we pointed out that the Supreme Court, the lower federal courts, and the Commission have all made clear that there is no First Amendment right to broadcast without a license and that this is true for low power operations as well as for other radio stations. In view of the settled constitutionality of the licensing requirement, we stated that Szoka should have applied for a license and requested a waiver of the rules limiting low power service if he wished to broadcast, but he did not do so. We also rejected Szoka's assertions, which he now repeats, that it would have been futile to seek a license and that the rules are unconstitutionally overbroad or standardless. And we explained that the low power broadcast rules are reasonably related to our statutory objective of achieving "a fair, efficient, and equitable distribution of radio services" in the United States, pursuant to 47 U.S.C. § 307(b), and are designed to permit the most efficient use of the spectrum.

7. Insofar as Szoka now appears to rely on the pending FM low power rulemaking, Creation of a Low Power Radio Service, to provide him substantive relief from the cease and desist order in this proceeding (Petition at 11), we emphasize again that the outcome of the rulemaking is distinct from the issue of Szoka's own misconduct. As we stated in our Decision at ¶ 19:

The proposed rules are prospective in nature, of course, and are totally separate from the Commission's repeated efforts, as here, to terminate all unlicensed radio operations. Moreover, the Commission has not yet decided whether parties who, like Szoka, have persisted in unlawful broadcast operations, even after Commission officials have issued repeated warnings and the Commission has initiated enforcement action, possess the requisite character qualifications to be eligible for a license in any new radio service.

8. With respect to Szoka's constitutional objection to the proposed forfeiture of \$11,000, our Decision carefully explained why the forfeiture amount in this case is not excessive or out of proportion in view of Szoka's serious, willful, and repeated violations of Section 301. In this regard, contrary to Szoka's assertion that his conduct was not willful, we provided a definition of the term "willful" to make clear that it refers to Szoka's knowing and deliberate operation of

an unlicensed broadcast station, irrespective of Szoka's intent to violate the law.

9. Finally, as for Szoka's request that we reduce the forfeiture amount to \$1 because of his inability to pay, we do not find that the financial documentation and other information submitted by Szoka with his Petition is sufficient to justify reduction of the proposed forfeiture. According to his personal financial statement, dated July 13, 1999, Szoka has \$8,500 in assets and a weekly salary of \$204 which, according to his Supplemental Declaration, derives from The Grid nightclub, the locus of Szoka's radio station. Szoka's 1997 federal income tax return shows adjusted gross income of \$13,005 and his 1998 federal income tax return shows adjusted gross income of \$11,119. In addition his 1996 and 1997 tax returns indicate that Szoka is self-employed as an electrician. His personal financial statement also indicates that Szoka has a 37% ownership interest in The Grid and a 1/12 interest in Wollen Mill, a commercial building. Szoka describes both these interests in his Supplemental Declaration as having "no current market value." He also states that his radio equipment has no present market value.

10. Although Szoka's stated assets and income do not appear to be large, we do not believe he has submitted sufficient objective evidence and supporting information to sustain his claim that they are so inadequate as to render him unable to pay a forfeiture. Nor, on their face, do they appear to be so. Thus, notably, although Szoka asserts that his commercial property interests and radio equipment have no value, it is not self-evident that this is the case, and Szoka offers no explanation or substantiation for these questionable claims or for the implication that these assets are unavailable to assist in paying the fine. Furthermore, as the Bureau notes, in spite of his assertions, Szoka's personal financial statement indicates that he has unpaid property taxes. The Bureau additionally points out that Szoka's personal financial statement also indicates that he owes federal taxes, but his federal tax returns indicate a refund for each of the last three years. Szoka offers no explanation for these apparent contradictions.² We therefore conclude that Szoka's showing is insufficient to justify a reduction in the forfeiture. See Bear Communications, Inc., 12 FCC Rcd 18108, 18109 (CIB 1997) (forfeiture not excessive compared to gross income over three years); Q. M. Tomlinson, Inc., 12 FCC Rcd 2981, 2982 (CIB 1997) (insufficient information to support inability to pay).

²In its opposition pleading, the Bureau expressly stated that further documentation was required from Szoka to resolve these questions (Bureau Opposition at 5), but Szoka did not take the opportunity to file a reply pleading to provide such information.

11. ACCORDINGLY, IT IS ORDERED That the Petition for Reconsideration filed July 15, 1999 by Jerry Szoka IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

A handwritten signature in cursive script, reading "Magalie Roman Salas".

Magalie Roman Salas
Secretary